No. 3973

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN TUPPELA, J. H. COBB as Trustee for John Tuppela, and GROVER C. WINN as Guardian of the person of John Tuppela,

Plaintiffs in Error,

vs.

ENOCH E. MATHESON,

Defendant in Error.

Brief for the Plaintiffs in Error.

Upon Writ of Error from the District Court for Alaska, Division Number One.

J. H. COBB,
Attorney for Plaintiffs in Error, and Guardian ad litem for John Tuppela.

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Statement of the Case

This was an action brought in the Court below by the defendant in error, as plaintiff, against the plaintiffs in error, as defendants, and we will hereinafter for convenience, designate the parties respectively as plaintiff and defendant.

The complaint sets forth three causes of action. In the first, the plaintiff alleged the insanity of John Tuppela; that J. H. Cobb was Trustee of all the property and estate of John Tuppela and that Grover C. Winn was the guardian of his person; that the plaintiff was an attorney-at-law and that on March 11, 1918, the plaintiff and the defendant, John Tuppela, entered into a contract whereby the plaintiff was

employed by Tuppela as an attorney-at-law to recover for him certain mining claims in Alaska, together with damages for the detention thereof, against the Chichagoff Mining Company, and in consideration of the services to be rendered, agreed and promised to pay him, the plaintiff, one-half of all sums of money recovered as damages and one-half of all property recovered; that the defendant Tuppela, in September, 1918, wrongfully breached said contract by wrongfully discharging the plaintiff from such employment and preventing him from performing further services thereunder. It was further alleged that the defendant Tuppela thereafter employed other counsel who brought suit and recovered property and money of the aggregate value of $900,000.00. It was further alleged that the plaintiff had rendered valuable services under his said employment, to-wit: Of the value of $150,000.00, and prayed for judgment for said sum on his first cause of action.

On his second cause of action, plaintiff made the same allegations of fact as under the first, except as to the service rendered and the value thereof, and alleged further that but for the breaching of the contract by the defendant Tuppela, he could and would have performed his part of the contract and have received one-half of the money and property recovered, and that by reason of the breaching he lost the value of said contract which he alleged to be $450,000.00, and asked judgment for said sum.

The third cause of action was for money loaned by the plaintiff to Tuppela in the aggregate sum of $362.50. (Rec. pp. 1-20.)

The defendants denied that the plaintiff was an attorney-at-law, and further denied the contract as plead, but admitted a contract between Tuppela and the plaintiff, a true copy of which was attached as

an exhibit to the answer. They further denied that plaintiff was discharged by the defendant Tuppela, wrongfully or otherwise. They denied that plaintiff had performed any services for the defendant Tuppela. They denied that the contract was of any value to the plaintiff or that he could or would have performed the same on his part, and they denied that plaintiff had loaned Tuppela any money.

As affirmative defenses the defendants alleged:

FIRST: That at the time of the execution of the contract referred to in the complaint the plaintiff was not now, and never had been, qualified and capable of performing on his part the duties and professional services therein undertaken by him, in that—it became and was the duty of the plaintiff under said contract and it was in the contemplation of the parties thereto that the plaintiff should bring an action in the name of John Tuppela against the Chichagoff Mining Company to recover the property in the contract mentioned, and that such suit could only be brought in the District Court for Alaska, and that plaintiff was not at the time of the execution of the contract, and was not now and never had been, admitted to practice in the courts of Alaska, and could not at said time become so qualified.

SECOND: That if it be true as complained by the plaintiff that if the defendant John Tuppela did discharge the plaintiff as his attorney that such discharge was justified by reason of the negligence of the plaintiff in failing, neglecting and refusing to bring the suit contemplated in the contract for more than one year from the date of the said contract of employment, or to come to Alaska and investigate the rights and titles of the said Tuppela thereunder, or to take any steps whatsoever toward a compliance with said contract on his part.

THIRD: That the defendant became insane in the early part of the year 1914, and was sent to an asylum, and was discharged on December 17, 1917; that about March 1, 1918, he met the plaintiff at Astoria, Oregon; that the plaintiff held himself out as an attorney-at-law; that Tuppela was an ignorant miner and prospector, unable to read or write the English language, and was at said time in bad health, mentally and physically, and utterly destitute; that all the property he owned was the mining property mentioned in the complaint, which was then in the possession of the Chichagoff Mining Company, and claimed by it through alleged conveyance of Tuppela's title; that Tuppela was desirous of finding an attorney who could and would undertake to provide the money to meet the necessary expenses of bringing and prosecuting to final judgment, a suit in his behalf to recover said claims, with reasonable skill and diligence, in consideration of a moiety of the fruits of said litigation, the said Tuppela having no other means whatsoever of procuring such money and legal services; that Tuppela fully acquainted the plaintiff with his condition, and all the facts concerning his rights to the property, and plaintiff then and there agreed on his part to bring such suit for Tuppela and prosecute the same to final judgment with reasonable skill and diligence, and furnish all moneys necessary for the expenses of the suit and for the support of Tuppela during the litigation, in consideration of an undivided half interest in the property in the event plaintiff should succeed in recovering the same for Tuppela. That after the agreement and understanding between plaintiff and Tuppela had been reached, plaintiff, as Tuppela's attorney, undertook to reduce the same to writing, but in so doing plaintiff intentionally and fraudulently

omitted from such writing, the obligation on the part of the plaintiff to furnish said money, and to bring and prosecute the suit with reasonable skill and diligence, but falsely represented to Tuppela that the contract correctly embodied their agreement, and Tuppela, being unable to read said contract, and relying upon the representation of the plaintiff, signed the same, believing it contained the stipulations and undertakings of the plaintiff aforesaid. A copy of the contract as signed by both parties was attached to the answer.

FOURTH: That after the employment of the plaintiff by the defendant Tuppela on March 11, 1918, the plaintiff wilfully and negligently failed to file said suit, or take any steps whatsoever under his said employment; that Tuppela waited upon plaintiff for more than a year; repeatedly requested him to file said suit; that plaintiff failed to do anything and wholly abandoned his said employment, and that on or about May 2, 1919, defendant Tuppela employed other counsel to perform such services, upon substantially the same terms as he had formerly employed the plaintiff; that plaintiff knew of such employment, and knew that such employment was had under the belief on the part of Tuppela that the plaintiff had abandoned his connection with the case, and so knowing, plaintiff made no objection thereto, and did not aid nor offer to aid in any way the prosecution of the suit, but acquiesced in the changes made in his situation and obligations on the part of Tuppela, intending, however, to thereby escape all the burdens, risks and obligations of his said employment, but in the event of a recovery of the property through the efforts, risks and expense of other counsel so employed by Tuppela, to assert a claim under the said contract of March 11, 1918. That if plain-

tiff had not in fact abandoned his said employment, it was his duty to, and he could and would have aided and taken part in the prosecution of said suit, and shared in the burdens and risks as well as the benefits resulting from the success finally achieved; that by his conduct aforesaid, plaintiff misled the said Tuppela and induced him to employ other counsel and pay them full value for professional services in said suit and that by reason of the premises, plaintiff is estopped to claim said contract of March 11, 1918, was not abandoned.

FIFTH: That if plaintiff did not abandon the contract of employment as stated above, prior to the time of the employment of other counsel by Tuppela, he was guilty of gross professional negligence, which justified the said Tuppela in discharging him, in that —he knew, or by the use of ordinary skill and diligence, should have known, that delay in bringing the suit and the prompt assertion of the claim of Tuppela to the property would greatly endanger the rights of the said Tuppela thereto, by laying the foundation for a plea of laches by the Chichagoff Mining Company; that it was the plaintiff's duty immediately upon accepting said employment, to bring and prosecute said suit with reasonable skill and diligence, but the plaintiff wilfully and negligently failed to bring said suit, or take any steps whatsoever therein, and after the expiration of more than a year from the date of the employment, Tuppela, in order to avoid the consequences to himself of the plaintiff's neglect, employed other counsel, and put an end to his contract with the plaintiff.

SIXTH: In answer to the third cause of action, it was alleged that if the plaintiff had advanced any money, as alleged in his complaint, the same was advanced under his contract, and was only to be repaid

upon the successful termination of the suit to be brought and prosecuted by the plaintiff; that the plaintiff wholly failed to bring said suit, and the money so advanced by him, if any, was of no benefit whatever to Tuppela, but was expended solely in a futile effort by the plaintiff to earn a fee. (Rec. pp. 22-32.)

In the reply, the plaintiff admitted that he was not now and had never been a member of the Alaska bar. All the other material allegations of the answer were put in issue. (Rec. pp. 36-38.)

At the trial, the plaintiff elected as between his first and second cause of action to stand upon the second, and the case was tried to a jury upon the second and third cause of action, and resulted in a verdict and judgment for $2,500.00 on the second cause of action, and $362.50 on the third cause of action. (Rec. pp. 40-41 and 44.)

At the conclusion of the evidence, the defendants made the following motion:

Now come the defendants, the evidence having been concluded, and move the Court to instruct the jury to return a verdict for the defendants upon the second cause of action on the following grounds, to-wit:

FIRST: There is nothing in the pleadings or the evidence to sustain a verdict against the defendant, J. H. Cobb, as trustee for John Tuppela.

SECOND: Because the evidence shows conclusively that plaintiff was not at the time of the making the contract sued upon, or subsequently, a member of the bar of Alaska, or qualified to become a member, and not qualified to perform the contract on his part; and it further shows that he never employed associate counsel, as he might have done under the contract, to perform the contract with him, and there

was not, and never has been any party to said contract, either originally or by association with plaintiff thereunder, qualified and capable of performing.

THIRD: Because the suit is based and bottomed upon the allegation that the plaintiff was wrongfully discharged by the defendant Tuppela, and the evidence fails to show that plaintiff was ever wrongfully discharged, or discharged at all. The most that is shown is that John Tuppela neglected his case and failed to co-operate with the plaintiff in his employment, and plaintiff thereupon elected to treat such conduct as a discharge and abandoned his contract.

FOURTH: The evidence conclusively shows that plaintiff was guilty of such gross negligence and delay as fully justified Tuppela in ignoring the contract and employing other counsel to protect his rights.

FIFTH: Neither the pleadings nor the evidence would sustain a verdict and judgment for plaintiff on the second cause of action, for this: Tuppela had a legal right to discharge plaintiff as his attorney with or without cause, subject only in the latter case to payment for services rendered, and plaintiff's remedy is a suit in quantum meruit, and not for damages on the contract.

But the Court denied said motion, and the defendants excepted. (Rec. pp. 284-286.)

Upon the trial a great deal of irrelevant and immaterial testimony was admitted over the defendants' objections, to which exceptions were taken. But as in our view of the case, its decision must turn upon certain questions of law arising upon undisputed facts, no errors have been assigned upon the rulings of the Court upon the evidence, and the case is presented here upon the following:

Assignments of Error.

I.

The Court erred in denying the motion of the defendants made at the conclusion of the evidence, for an instructed verdict for the defendants on the second cause of action.

II.

The Court erred in refusing the prayer of the defendants to instruct the jury as follows: Gentlemen of the Jury. The contract upon which the plaintiff sues in this case, obligated him, as an attorney-at-law, to bring a suit in behalf of the defendant, John Tuppela, against the Chichagoff Mining Company to recover certain mining property on Chichagoff Island, Alaska. Such a suit could only be brought in the Courts of Alaska; therefore, while the contract is silent as to the place where the suit was to be brought, it is to be read and construed as though it expressly provided for the bringing of the suit in the Courts of Alaska. It further appears that at the time of making the contract, plaintiff was not qualified in law to bring such suit or to perform the services he was obligated to perform under it, nor did he, during the time he claims the contract was in force or at any time, qualify himself to perform the contract by complying with the laws of Alaska, and becoming a member of the bar of this Court. He cannot therefore recover anything for a breach of said contract, or for any services he may have rendered under it.

III.

The Court erred in instructing the jury as follows:

It is admitted by the plaintiff in his reply, that he has not been admitted to practice as an attorney-at-law in the Courts of the Territory of Alaska, but it is alleged that he is an attorney and was at all times

mentioned in the complaint an attorney authorized to practice in the courts of the State of Oregon where the contract appears to have been made.

I instruct you, as a matter of law, that the courts of the Territory of Alaska, wherein the real property mentioned in plaintiff's complaint and described in the contract is situated, have the sole jurisdiction of an action to recover the mining property therein mentioned; and if the plaintiff was not authorized to practice the profession of attorney-at-law in the Territory of Alaska at the time of entering into such a contract, he would not be qualified to perform the professional services required by said contract, and if that were so, without any other stipulation being entered into in said contract, it would be a defense to said action.

But if you further find from the evidence that the defendant Tuppela, who entered into said contract of employment with the plaintiff, was informed of such fact of plaintiff not being authorized to practice in Alaska at the time of entering into the said contract, and that such contingency, with the knowledge and consent of the said Tuppela was provided for in said contract by authorizing the plaintiff to associate competent counsel, authorized to prosecute the contemplated proceedings, suits or actions with the plaintiff, and without expense to the defendant Tuppela, then the fact that the plaintiff was not authorized to practice law in the Territory of Alaska would be no defense in this action, and if you so find, you will not further consider said defense.

IV.

The Court erred in instructing the jury as follows:

Answering the first question, this question is comprehended in the third question, and both may be answered as one. I instruct you that when the rela-

tion of attorney and client exists, it is requisite that there should be mutually the utmost frankness, candor, trust and confidence between them, and where there arises between them distrust or lack of confidence reasonably to be inferred from the conduct of either, then the party responsible for the reasonable lack of confidence or distrust, is the party at fault. For that reason, all the facts, circumstances and conditions concerning the relations of the parties to this action—that is, the defendant Tuppela and the plaintiff Matheson, were admitted in evidence for your determination whether the defendant Tuppela, without justification, or wrongfully, discharged plaintiff, or whether the plaintiff wrongfully abandoned the contract.

There is in this case no evidence of a formal dismissal of the plaintiff from the services of the defendant, and the question as to whether he was discharged must be inferred by the jury one way or the other from the circumstances surrounding the case and the actions of the parties. The plaintiff claims that he was discharged by the defendant Tuppela, and bases his contention on the acts of the defendant Tuppela in connection with the case, which he says and which he insists, amount to a discharge. It, under these conditions, becomes your duty to determine, from the facts and circumstances and conditions produced in evidence, whether or not the acts of the defendant Tuppela were such as would lead a reasonable man, under the circumstances, to believe that he was discharged. If you find from the evidence that they were such acts of the defendant Tuppela, as to lead a reasonable man to believe that he was discharged, then it would be your duty to find that he, the plaintiff, was discharged. If they were not, your duty would be to find that he was not discharged.

V.

The Court erred in instructing the jury as follows:

The second question arising, if you find that the plaintiff was discharged by the defendant, is, was the discharge wrongful or without sufficient cause? In the consideration of this question, you should consider whether or not the acts of the plaintiff were such as to cause a reasonable man, being a client, to lose confidence in the promptness, ability and fair dealing of his attorney. If they were, the discharge would not be wrongful or without sufficient cause. On the other hand, if such acts were not such as to make a reasonable man to lose confidence in the promptness, skill and ability of his attorney, and without such reasonable cause he discharged him, you should find that the attorney was wrongfully discharged. (Rec. pp. 362-6.)

Argument.

There are five controlling questions of law arising upon these assignments.

FIRST: Neither the pleadings nor evidence tended to show any liability to the plaintiff in the part of the defendant J. H. Cobb, as Trustee for John Tuppela. (First assignment.)

SECOND: The plaintiff not being a member of the bar of Alaska, had no capacity to perform the services stipulated in the contract, and could not recover either on the contract or in quantum meruit. (First, second and third assignments.)

THIRD: The failure of the proof to show that plaintiff was discharged by Tuppela. (First, fourth and fifth assignments.)

FOURTH: The proof showed conclusively that plaintiff had been guilty of such negligence as fully justified Tuppela in discharging him as his attorney in any event. (First and fifth assignments.)

FIFTH: Plaintiff's remedy was a suit on quantum meruit for the value of the services rendered, and not for damages on the contract. (First assignment.)

We will present these questions in the order above stated.

FIRST: J. H. Cobb, as Trustee for John Tuppela, was a stranger to the contract sued upon. No rule is better settled than that a stranger to a contract cannot be sued thereon. 12 Corp. Juris 713. We pass this ground without further comment.

SECOND: Plaintiff is not and was not admitted to practice in the courts of Alaska. (Rec. pp. 116.) He was only admitted to practice in July 1915, in the courts of Oregon, (Rec. pp. 331) less than three years before he made the contract sued on, which was March 11, 1918. He could not under the law be admitted to practice in Alaska for some two years more. He was never therefore, capable of performing the services he assumed to perform under the contract, and cannot recover thereon. The point was raised both on the motion for an instructed verdict and by the requested instruction which are denied. (Rec. pp. 281-287.)

Section 1565 of the Compiled Laws of Alaska prescribes what the application for admission to the bar shall show, and prescribes the examination of the applicant. Section 1567 reads: "If, upon examination, the applicant be found qualified, the Court shall administer an oath to the applicant to support the Constitution and laws of the United States and of the District, and to faithfully and honestly demean himself or herself in office. The Court shall direct an order to be entered to the effect that the applicant is a citizen of the United States and of the District, of the age of twenty-one years, of good moral character,

and possessed of the requisite learning and ability to practice as an attorney in all the courts of the District, and has taken the oath of office; and upon the entry of the order and payment of the legal fee he or she is entitled to practice as such attorney, *and not otherwise.*" *(Italics ours.)*

These sections were amended by an Act of the Alaska Legislature, Session Laws 1915, Chapter 75. The first three sections prescribe a two-years course of study in the office of an Alaska attorney, registration of the applicant, etc. Section four provides for the admission of those who have within the three years next preceding the application for admission, taken a course in an accredited law school. None of these provisions are material to the question here involved.

Section five reads as follows: "Whenever an applicant for admission to practice law in this Territory as an attorney and counsellor shall present to the District Court a certificate from a Judge of the highest court in any State or Territory of the United States, showing the applicant to have been duly admitted to practice law as an attorney and counsellor in the highest Court of such State or Territory, or in any one of the district courts or the Supreme Court of the United States, and that he has practiced therein as such an attorney for a period of five years continuously immediately prior to the date of his application, and that he is in good standing in such Court of said State or Territory or other Court, such applicant may be admitted to practice law as an attorney and counsellor in this Territory without further examination."

Section seven repeals all "Acts and parts of Acts *inconsistent with this Act.*" *(Italics ours.)*

Thus stood the law at the time the contract was made for professional services between plaintiff and

Tuppela. When plaintiff should have been duly admitted, taken the oath, etc., he could practice as an attorney "and not otherwise." Now, plaintiff was first admitted to practice in the courts of Oregon in July 1915. (Rec. pp. 331.) By no possibility then could he become qualified to be admitted to the Alaska bar prior to July 1920, or some two years and a half after he made the contract. In fact, he never became a member of the Alaska bar. Either through ignorance or design then, the plaintiff had inveigled John Tuppela—this old illiterate prospector—into a contract which it was impossible for the plaintiff to perform. The promises contained in the contract then on the part of Tuppela were without consideration and void.

The authorities upon this question, to the honor of the profession, are not very numerous, but wherever the question has arisen the courts have not hesitated to pronounce such contracts absolutely void and incapable of being the basis of an action either on the contract or on quantum meruit.

(6 Corp. Jur. 721.)

Thornton on Attorneys at Law, Vol. 1, p. 25.

Hitson vs. Brown, 3 Col. 304.

Bochman vs. O'Reilly (Col.) 24 Pac. 548.

Tedrick vs. Hines, 61 Ill. 189.

Ames vs. Gilman, 10 Metc. (Mass.) 239.

The learned trial judge seems to have been impressed with these authorities, and the reasons upon which they are grounded, for he charged the jury that "if the plaintiff was not authorized to practice the profession of attorney-at-law in the Territory of Alaska at the time of entering into such a contract, he would not be qualified to perform the professional services required by said contract, and if that were so, without any other stipulation being entered into

in said contract, it would be a defense to said action." (Rec. p. 307.)

The Court, however, further instructed the jury: "But if you further find from the evidence that the defendant Tuppela, who entered into said contract of employment with the plaintiff, was informed of such fact of plaintiff not being authorized to practice in Alaska at the time of entering into said contract, and that such contingency, with the knowledge and consent of the said Tuppela, was provided for in said contract by authorizing the plaintiff to associate competent counsel, authorized to prosecute the contemplated proceedings, suits or actions with the plaintiff, and without expense to the defendant Tuppela, then the fact that the plaintiff was not authorized to practice law in the Territory of Alaska would be no defense to this action, and if you so find, you will not further consider said defense." (Rec. p. 307-8.)

To this instruction defendants excepted. (Rec. p. 325.) There are several errors in this instruction. In the first place, it is not the law. A contract for services of an attorney is a contract for *personal service of that attorney.* The attorney cannot therefore, except by consent of his client, delegate the performance of the service to another. 6 Corp. Juris 668. And the fact that the attorney has in his contract with his client stipulated for the right to employ associate counsel does not relieve him of his obligation to render his own professional services personally. That is the gist of what the client has contracted for. Second, there was not a scintilla of evidence that John Tuppela, at the time he entered into the contract "was informed that plaintiff was not authorized to practice in Alaska, and that contingency was provided for in the contract with the knowledge and consent of Tuppela by the insertion of the clause permit-

ting the plaintiff to employ associate counsel." Nor did the clause in the contract itself provide for the employment of associate counsel "authorized to prosecute the contemplated proceedings," etc., as the Court erroneously assumed that it did. Third, the stipulation permitting the plaintiff to employ associate counsel was purely optional with him. Tuppela had no right under the contract either to insist upon, or object to the employment of associate counsel. The contract by its terms was just as binding upon Tuppela whether plaintiff employed associate counsel or not, *and he never did employ associate counsel.* Rec. p. 135.

Third. The evidence wholly fails to show that plaintiff was ever discharged by John Tuppela, either wrongfully or otherwise. Without the allegation and proof of this as a fact, the second cause of action set out in the complaint must wholly fail. The action is based and bottomed upon that proposition. But the Court submitted that question to the jury in the instructions complained of which were given and excepted to. The undisputed evidence upon this point is that of the plaintiff. Tuppela's lips were sealed by insanity.

In his direct examination plaintiff's counsel called his attention to the letter of J. H. Cobb of August 5, 1920, and asked:

Q. Mr. Matheson, I call your attention to the statement made by Mr. Cobb in that letter, in which he says that, "Mr. Tuppela states that after the contract was made, and after waiting on you for several months to begin action, he notified you that the contract was at an end for your failure to act." I ask you to state, Mr. Matheson, what, if any, notification John Tuppela, or anyone in his behalf, ever gave you that this contract between you and Mr. Tuppela was

at an end on account of your failure to act, or on any other account whatsoever?

A. There was no statement made to me to that effect, or in any way to this day, excepting what he says in the answer to the complaint. (Rec. p. 110.)

How and when then was plaintiff discharged? *There is absolutely nothing in the record to show.* According to the complaint and the evidence of plaintiff there was no discharge prior to September, 1918; although during this six months period plaintiff had done nothing to carry out his contract of employment, and could give no tangible reason for his failure. Tuppela was still patient, though if he had been a man of ordinary intelligence or exercised ordinary care, he unquestionably would have discharged him.

Two sets of circumstances in evidence induced the learned trial judge to deny the defendant's motion for an instructed verdict for failure of proof on this point, and to submit the question of discharge to the jury, namely: the failure of Tuppela to write to plaintiff after he left Astoria for Alaska, about September 1, 1918, and Tuppela's employment of other counsel in May, 1919.

The testimony bearing upon the above matters is, in substance, as follows: From the time of the signing of the contract sued upon, March 11th, 1918, till about the first of the following September, Tuppela remained in, or in the vicinity of, Astoria, Oregon, (Rec. 73,) although an abortive effort was made for him and plaintiff to come to Alaska in July (Rec. 77-78). About the 28th or 29th of August, 1918, Tuppela left Astoria for Alaska, plaintiff furnishing him $25.00, and Tuppela said he had $300.00 due him from an Alaska miner then fishing in Astoria. (Rec. 82-83.) Tuppela was to go to Alaska, get certain papers and interview and get the addresses of certain per-

sons and send the papers and addresses of the witnesses to plaintiff at Astoria, and plaintiff was to get in touch with them and find out what they would testify to. The relations between plaintiff and Tuppela were friendly up to this time, and plaintiff was willing to go on with his contract. (Rec. 83-4.) After Tuppela left for Alaska, plaintiff never heard from him directly or indirectly, except that he heard from other parties that he had gone to Sitka, and in December he heard he was sick in a hospital with the flu. (Rec. 84-84.) Plaintiff hoped to hear from Tuppela in November. The reason he, (plaintiff,) didn't go to Alaska with Tuppela was, that he was too busy with other matters and it was the cheapest for both for Tuppela to go and furnish plaintiff with the facts. (Rec. 85.) When plaintiff failed to hear from Tuppela in November, 1918, plaintiff wrote him a letter in long hand in the Finnish language, directed to Sitka, Alaska, asking him if he had found the witnesses and papers, and whether he had been sick, and that he write to him. (Rec. 86-89.) To this letter he received no reply and the letter was never returned to him.

Sometime later plaintiff heard that Tuppela had employed other counsel in Alaska, and about March 1, 1919, he wrote him a letter in long hand in the Finnish language, directed to Juneau, Alaska, asking him if he had retained another attorney, and to write to him, plaintiff. This letter was never answered, and was never returned. (Rec. 94-6.) In the summer of 1919 plaintiff received the following letter:

"J. H. Cobb, Juneau, Alaska, July 17th, 1919.

Mr. Enoch E. Matheson,

Astoria, Oregon.

Dear Sir:

Mr. John Tuppela says he left with you, in March

last, a lot of papers pertaining to certain mining claims near Chichagoff and Sitka, Alaska. These papers he now needs. Will you please send them to me or to John Tuppela, Juneau, Alaska.

Very truly yours,

J. H. COBB."

(Rec. 97.)

Upon receipt of this letter plaintiff wrote to John Tuppela, in long hand, in the Finnish language, directed to Juneau, Alaska, in substance that he (plaintiff) had received a latter from J. H. Cobb, of Juneau, and that he (Tuppela) had never sent plaintiff the papers that he went after, and again asking him if he had retained an attorney here, "as I had been informed previously, and had written him previously, to let me know so that I could act accordingly." (Rec. 98-99.) Plaintiff received no reply to this letter. Plaintiff was afterwards informed that Tuppela had retained other counsel and had the case in Court, "and couldn't do anything so far as that case was concerned." (Rec. 100.)

There was no evidence of any other step taken by plaintiff until Feb. 20th, 1920, over six months, when he wrote to the clerk of the District Court at Juneau, as follows:

"Would you kindly inform me whether or not there is a case pending in your Court wherein John Tuppela is plaintiff against a certain mining company at Chichagoff or Sitka, Alaska, or whether he has had any case pending there within the last two years or so.

Thanking you for an early reply, I remain," etc. (Rec. 101.)

To this letter the Clerk on March 3rd, 1920, replied as follows:

"Enoch E. Mathison, Esq.,

"Attornev at Law,

"Astoria, Oregon.

"Dear Sir:

"Your letter of February 20th at hand, and in reply to your inquiry therein, I would say that an equity suit was begun on May 10, 1919, by John Tuppela, plaintiff, against the Chichagof Mining Company, a corporation, defendant. The plaintiff's attorneys are John R. Winn and J. H. Cobb, both of Juneau. The defendant is represented by H. L. Faulkner of Juneau, and former Supreme Court Justice (88) O. G. Ellis, of Tacoma, Wash.

"The relief prayed for in the complaint was, among other things, that plaintiff be decreed to be the owner of an undivided one-half interest in certain lode claims situated at or near Klag Bay on the west side of Chichagof Island, Alaska; that an accounting be rendered plaintiff for the gold extracted from these claims, and that, pending the final determination of the suit, a temporary injunction issue.

"The trial began on November 20, 1919, was concluded on November 29th, and taken under advisement.

"On February 25th, 1920, a decree was entered, dismissing the complaint.

"Yours truly
"J. W. BELL,
"Clerk.
"By John T. Reed,
"Deputy."

At the same time plaintiff wrote the Clerk he also wrote to J. H. Cobb, the following letter:

"February 20, 1920.

"Mr. J. H. Cobb,
"Juneau, Alaska,

"Dear Sir:

"Last summer you wrote me a letter regarding the

whereabouts of John Tuppela, and asking for certain papers he may have left with me. The letter was lost and I have just found the same. Would you kindly let me know whether he is in Juneau or not, or whether you know of his whereabouts, as he has some matters pending here which he had neglected to complete.

"Respectfully yours,

"ENOCH E. MATHISON."

(Rec. 104.) To this letter plaintiff received no reply. (Rec. 105.)

The plaintiff did nothing more until July 7th, 1920, when having seen in the newspapers that the U. S. Circuit Court of Appeals had reversed the case of Tuppela vs. Chichagoff Mining Co., and rendered judgment for Appellant (Rec. 143) he wrote to John Tuppela as follows:

"Mathison & Mannix,

"Attorneys at Law,

"Astoria, Oregon, July 7, 1920.

"Mr. John Tuppela,

"Juneau, Alaska,

"Dear Sir:

Information has been brought to me to the effect that you were successful in the legal proceedings instituted by you against the Chichagof Mining Corporation, arising out of matters in connection with the contract you entered into with me, hereinafter more particularly mentioned. Previously, after receiving information that you probably were located at Juneau, Alaska, I wrote you several letters to substantiate that fact, but received no reply from you. I have endeavored to get in touch with you since the summer of 1918, so that I could proceed with the litigation, but no one seemed to know where you went to. On March 3, 1920, in answer to my inquiry, I re-

ceived a communication from the Clerk of the United States District Court at Juneau, Alaska, to the effect that you had started these proceedings, but outside of these two sources of information I have not received any information as to what you were doing in the premises.

"I am writing this letter for information. I call your attention at this time specifically to the fact that on the 11th day of March, 1918, you entered into a contract with me, the same being in writing, and by the terms of said contract you retained me as your attorney to prosecute your claims against this particular corporation, or any other parties holding adverse to you, in the matter of those certain mining claims which appear to have been the subject-matter of the litigation referred to hereinabove. By the terms of this (92) agreement I was empowered to proceed with all matters pertaining to your interest in said mining claims, and the rate of compensation which I was to receive was clearly set forth in said contract, you retaining a copy of the same. At this time I respectfully request that you examine said contract and then communicate with me as to what you will do in the matter of compensating me for the work which I did under said contract and for the damage which I suffered because of the breach of said contract on your part.

"I do not propose in this letter to recite the work which I did in your behalf after the execution of said contract as that is beyond the purview of this letter, and you personally know concerning the large amount of the work which I did on your behalf, but I wish at this time to state that I am able to conclusively show that I was at all time ready, able and willing to fully carry out all the terms of said agreement to be kept and performed on my part, and that

you, shortly after the execution of this agreement, failed to keep your part of the same and left for parts unknown to me, thus rendering it impossible for you to properly conduct your case in accordance with the terms of said agreement.

"As stated before, I will not undertake to rehearse all the facts in relation to the matter at this time, but request that you give this matter your early and earnest consideration to the end that any litigation may be avoided and a prompt and satisfactory settlement arrived at.

"Trusting to hear from you at an early date, I remain,

"Very truly yours,

"ENOCH E. MATHISON."

(Rec. 106-8.)

Plaintiff received no answer to this letter from Tuppela, but did receive the following from J. H. Cobb:

"Juneau, Alaska, August 5, 1920.

"Mr. Enoch E. Mathison,

"305 Spexarth Bldg.,

"Astoria, Oregon.

"Dear Sir:

"Mr. John Tuppela received your letter of July 7, today, and I have carefully read it to him. He has also shown me a duplicate original of the contract you mentioned, dated March 11, 1918. Mr. Tuppela states that after the contract was made and after waiting on you several months to begin action, he notified you that the contract was at an end, for your failure to act.

"Mr. Tuppela employed Judge John R. Winn to bring a suit to recover his property, in May, 1919. Judge Winn associated me with him. We brought the suit and were ultimately successful. However, the

lower Court held against us, and one of the grounds of its decision was that Tuppela was guilty of laches, in waiting so long (17 months) to bring his suit. Also in July, 1919, I wrote you asking for any papers Tuppela might have left with you. To this letter I never had the courtesy of an answer.

"Under these circumstances, I wholly fail to see how you have any rights under your contract. On the other hand, if (94) the United States Circuit Court of Appeals had affirmed the ruling of the lower court on the question of laches, Tuppela would probably have had a serious action against you for negligence.

"Very truly yours,
"J. H. COBB."

To this letter plaintiff made no reply (Rec. 143) and fourteen months thereafter, and after he had learned that Tuppela had again become insane, (Rec. 144) though he denied it till his attention was called to his complaint, he brought this suit.

Plaintiff also testified that he made no objection to the employment of other counsel by Tuppela, (Rec. 129) and that after he received the letter from the Clerk of the Court informing him that Tuppela had lost the case in the lower Court he made no effort to redeem the situation such as offering to join, or aid in the appeal. (Rec. 133.)

The evidence also shows, that Tuppela was an old, ignorant prospector, unable to read or write the English language at all, or to write or read writing in any language. (Rec. 246.) Plaintiff knew that Tuppela couldn't read English (Rec. 142) but he had an "impression" that he could read Finnish writing. (Rec. 161.) After reaching Alaska in 1918 Tuppela was utterly penniless, and was supported for a time by Judge Winn, and some Finns, and early in March,

1919, had to be sent to the Pioneers House, a charitable institution maintained by the Territory, where he remained until May, 1919, when on May 9th, 1919, he entered into a contract with J. R. Winn and J. H. Cobb to bring suit for him against the Chichagoff Mining Co. (Rec. 247, 349.)

We confidently assert that there is nothing in all this showing or tending to show a discharge of plaintiff by Tuppela or any breach of the contract on the part of the latter. The most that it shows is that because Tuppela was not as active and alert in attending to his case as plaintiff desired and conceived he should be, the plaintiff neglected Tuppela's case for some fourteen months, neither attempting to settle (Rec. 124) nor filing the suit until Tuppela, apparently despairing of the plaintiff employed other counsel. Plaintiff when pressed on cross-examination as to what prevented him from carrying out or attempting to carry out his contract during the fourteen months elapsing from the time it was made until the employment of other counsel *made no claim that it was because he was discharged,* but apparently attempted to sum up his case. When asked: "Was there anything after the contract was signed and prior to the time that the suit of Tuppela against the Chichagoff Mining Co. was filed in this Court, about fourteen months lacking nine days, was there anything to prevent you from associating counsel with you up here?"

His answer was: "Oh yes!"

Q. What?

A. Tuppela's actions himself.

Q. Tuppela's actions in coming up here to look after his case?

A. He didn't comply with my instructions or his part of the contract in getting the information and

getting the papers and writing me, or coming back and making a report."

Obviously this answer imputes a term in the contract which is not there, namely, that Tuppela was under contract to get information and papers, and write to the plaintiff and return and make a report. Eliminating that the gist of the answer is that Tuppela's failure to comply with plaintiff's instructions was the sole reason for his failure to take the first step to carry out the contract on his part.

But negligence of the client is not a discharge of the attorney, though it may justify the attorney's withdrawal.

Brown vs. Goll, 62 So. Rep. 154.

Welch vs. Shumway, 65 Ill. 473.

And surely the rule would apply with peculiar force in the case of a client like Tuppela, old, infirm, just released from three and a half years' confinement in an asylum, penniless and so ignorant as to be unable to read or write.

Other counsel was employed by Tuppela in May, 1919, though plaintiff claims to have heard of it before that. Indeed he seems to have been expecting it, which was certainly reasonable.

But employment of other counsel does not operate as a discharge of counsel first employed, unless such counsel has good cause to object and does object thereto.

Ruling case Law, Vol. 3, 30, p. 958.

Temey vs. Berger, 93 N. Y. 524.

Plaintiff knew at the time or shortly after of the employment of Winn and Cobb, and made no objection whatever thereto. His actions throughout were those of one who had no further interest in the matter.

The proof then, so far from showing a discharge of

plaintiff by Tuppela, merely showed that plaintiff because of Tuppela's failure to carry out his instructions or co-operate with him as fully as he deemed proper, abandoned his employment. And in that case he cannot recover.

Thornton vs. Attorneys, vol. 2, 735.

Cahill vs. Baird, 70 Poe, 1061.

Walsh vs. Shumway, 65 Ill. 473.

FOURTH: Conceding for the sake of the argument, however, that plaintiff was discharged by the defendant Tuppela, was the latter justified in so doing? We submit that the proof shows conclusively that he was. The facts have been fully stated under the next preceding head of this brief, and will not be repeated here except to call attention to certain outstanding facts. Plaintiff was employed March 11, 1918. He neither filed the suit, nor made any effort to settle or compromise *at any time.* There was nothing to prevent his proceeding to perform his contract in March, April, May or June following. He did attempt to come to Alaska with Tuppela in July, but after Tuppela started plaintiff called it off because he was busy. There was nothing to prevent his acting in August, September, October, November or December, 1918, or in January, February, March or April, 1919, except Tuppela's conduct in not returning to Astoria. But Tuppela was first sick in a hospital in December, 1918, and then had to be sent to the Pioneers Home as a pauper, till May, 1919. And the suit had to be filed in Alaska if filed at all. Here then, was negligence on the part of the plaintiff, especially in view of the nature of the case, and the condition of his client, so gross as to be almost criminal, and sufficient at least for disbarment.

According to the uncontradicted evidence (Testimony of Wickirsham, Rustgood and Roden (Rec.

pp. 223-240) such a suit, in the exercise of ordinary care on the part of an attorney of ordinary skill and prudence, should have been brought in from thirty to ninety days after the employment. Tuppela waited fourteen months, lacking three days, before employing other counsel. He waited six months in Astoria, before doing anything of which plaintiff can even find complaint. How much longer should he have waited? Till his rights were barred by laches? Till his mine was exhausted and the defendant company liquidated? We submit that as matter of law the Court should have held plaintiff barred from recovery by his own negligence.

6 Corp. Juris 722.

Thorn vs. Beard, 32 N. E. Rep. 140.

But the Court accentuated this error in the instructions given and here complained of. After the jury had retired and considered the case awhile, they returned into Court, and propounded the following questions:

1. "If the jury find that there was laxity or fault on part of both parties to suit, for whom should the verdict be rendered on the second cause of the complaint?"

2. "If the jury finds that there was a laxity on both plaintiff and defendant in living up to the terms of the contract, but that the plaintiff had performed legal services, should the jury find damages for the plaintiff on the second cause of the complaint to the extent of the services performed?"

3. "If the jury find that there was laxity or fault on the part of both parties to suit, but unequal in degree, how should a verdict be rendered on the second cause of the complaint?" (Rec. p. 325-6.)

In answer to the questions the Court gave the in-

structions complained of in assignment IV and V, and defendants excepted, (Rec. 336-331) on the specific ground that there were not sufficient facts and circumstances in evidence in connection with Tuppela's conduct or alleged conduct to justify the question of discharge going to the jury.

Tuppela had been insane, was of weak mentality, and has just gone insane again; but he was not so insane in 1918 as not to be dissatisfied with plaintiff's gross neglect to file his suit, or take any steps whatsoever to comply with his contract of employment. He would have been insane indeed not to have ignored the plaintiff and employed counsel qualified to act, and who could and who would and did bring his suit and protect his rights.

FIFTH: Plaintiff has mistaken his remedy, and neither the pleadings nor the evidence sustains the verdict and judgment on the second cause of action.

Plaintiff sued in his first cause of action, for the value of the services he claimed to have rendered; in his second cause of action, for the value of his contract, which he alleged was wrongfully broken by Tuppela. At the beginning of the trial, plaintiff elected to go to trial on his second cause, realizing evidently his inability to prove that he had rendered any service of any value to Tuppela.

It is our contention that where an attorney is employed on a contingent fee, and wrongfully discharged before the fee is earned, his only remedy is a suit on quantum meruit for the value of the services rendered; that this rule necessarily results from the nature of the employment and the relation of trust and confidence that must exist between attorney and client; that where a client for any reason, or no reason, has become dissatisfied with his attorney, he has a right to discharge him upon payment for the ser-

vices rendered and employ another; and that it is against public policy for the law to penalize the client in such a case, by holding him further liable for what the attorney might have earned under the contract.

We are aware that the authorities are divided upon this proposition, but we think the better and true rule is that announced in the recent case of Ramey vs. Graves et al., 191 Pac. 801, by the Supreme Court at Washington, as follows:

"Where the attorney's compensation is contingent on the successful prosecution of a suit, and he is discharged or prevented from performing the service, the measure of damages is not the agreed contingent fee, but reasonable compensation for the services actually rendered, and in the absence of evidence of such reasonable value there can be no recovery." In support of this proposition the Court cites:

6 Corp. Juris 725.

Pratt vs. Kearns, 123 Ill. app. 86.

Josephs Adm'r vs. Lapps Adm'r., (Ky) 78 S. W. 1119.

Western Un. Tel. Co. vs. Summers et al., 73 Md. 9, 20 Atl. 129.

Harris Adm'r vs. Root et al., 28 Mont. 159, 72 Pac. 429.

French vs. Cunningham et al., 149 Ind. 632, 49 N. E. 797.

"The law is well settled that a client has the right to discharge his attorney at any time either with or without cause; and this is true, although the motion for permission to substitute is resisted by a person claiming to be the assignee of the interests of such party, where there is a controversy as to such assignment. The relation between attorney and client is such that the client is justified in seeking to dissolve that relation whenever he ceases to have absolute con-

fidence in either the integrity, the judgment, or the capacity of the attorney." 6 Corp. Juris 676-7.

"This right of discharge exists even though a contingent fee has been agreed upon." 6 Corp. Jur. 677.

The authorities cited fully sustain the text above quoted. If this be the law, then the rule we contend for necessarily follows. For "Every attorney enters into the service of his client subject to the rule that his client may dismiss or supersede him at will; and if he makes a contract for future services to his client, it is necessarily subject to such rule, and made with full knowledge that he may never perform such service for the reason that his client may not keep him, and that in that event he will not be paid therefor, but will be entitled to compensation only for the services he has actually rendered."

Johnson vs. Ravitch, 113 App. Div. 810, 812, 99 N.Y.S. 1059.

The plaintiff neither alleged nor proved the value of the service he rendered. The Court refused to instruct on this issue, but instructed the jury that the measure of the plaintiff's recovery was what he would have earned had he successfully prosecuted the suit, less the reasonable value of the services he would have had to perform to carry out his contract. This was manifest error.

In conclusion we respectfully submit that the judgment below must be reversed, because:

FIRST: There is nothing in the pleadings or evidence to support the verdict and judgment against J. H. Cobb as Trustee.

SECOND: Plaintiff was not admitted to practice in the courts of Alaska, at the time he made the contract sued upon; was not qualified to be admitted; and has never been admitted.

THIRD: There was no evidence to sustain a finding that plaintiff had been discharged wrongfully or otherwise, the evidence merely showing an abandonment by plaintiff. *But*

FOURTH: If plaintiff was discharged by Tuppela such discharge was fully justified by plaintiff's failure to either file the suit contemplated in the contract, to either settle or attempt to settle with the Chichagoff Mining Company, or in fact, do anything whatsoever under his contract.

FIFTH: Plaintiff's remedy for a breach of the contract alleged is a suit on quantum meruit only and not for the value of the contract to him.

Respectfully submitted,

J. H. COBB,
Attorney for Plaintiffs in Error, and Guardian ad litem for John Tuppela.